No. 99-434

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

DANCO, INC., and BENJAMIN GUILIANI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Danco, Inc. has no parent company(ies), nor does any publicly held company own any of Danco, Inc.'s stock.

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STATEMENT OF THE CASE

1. In 1988, Benjamin Guiliani (hereinafter "Mr. Guiliani"), a Mexican-American, founded Danco, which he later lawfully incorporated as Danco, Inc. (hereinafter "Danco"). The purpose of the company was to maintain and clean the parking lots of various retail enterprises. (App. 1a).

2. On September 15, 1994, Danco entered into a contract with Wal-Mart Stores, Inc. (hereinafter "Wal-Mart") to perform parking lot maintenance by removing litter and sand three times per week. (App. 1a).

3. In October of 1994, Mr. Guiliani saw a Wal-Mart employee, Bob Amadei, in the Augusta, Maine, store parking lot shortly before he viewed the spray-painted words "White Supremacy" on the Wal-Mart lot where he typically unloaded his cleaning equipment. Mr. Guiliani's son saw Amadei with a spray can immediately before he saw the graffiti. Mr. Guiliani brought the graffiti to the attention of store manager, Curtis Scheffe, who agreed to investigate and remove the graffiti. However, the words remained for more than two months until they wore away naturally. Mr. Scheffe concluded that no one at Wal-Mart was willing to say they knew anything about the incident, and failed to take corrective action. (App. 2a, 3a).

4. On October 14, 1994, Mr. Guiliani reported to Mr. Scheffe that another Wal-Mart employee, Scott Hamlin, had told him "I don't like your kind." He explained that when Mr. Guiliani asked what he meant, Mr. Hamlin said "Puerto Ricans" and pushed Mr. Guiliani. Mr. Guiliani also reported this incident to Mr. Scheffe and to the Augusta Police Department. Again, Mr. Scheffe failed to take any corrective action. (App. 3a).

5. In November of 1994, Mr. Guiliani was subjected to a racial slur from Mr. Hamlin, who yelled the slur at Mr. Guiliani in Wal-Mart's lot from a passing vehicle. Mr. Scheffe again was notified, but did not discipline Mr. Hamlin. (App. 3a).

6. These incidents on Wal-Mart's premises directly interfered with Mr. Guiliani's work such that he began to perform his duties during the day rather than at night, as had been his custom in the past, and he remained fearful for his and his family's safety. (App. 23a).

7. In January of 1995, James Helterbrake replaced Curtis Scheffe as the Augusta Wal-Mart manager. Mr. Guiliani informed Mr. Helterbrake of the prior racial incidents and his contact with the police. Mr. Helterbrake became angry, suggesting that Mr. Guiliani was overreacting and thereafter treated Mr. Guiliani in a hostile manner. (App. 20a).

8. In late March of 1995, while Mr. Guiliani and his son were completing their cleaning duties, a sanding contractor began sanding the ice while Mr. Helterbrake watched. The following day Mr. Helterbrake terminated Danco's contract on the grounds that he had not cleaned up the sand properly the previous night and informed Mr. Guiliani that he did not wish to see him around the Augusta Wal-Mart store again. (App. 20a).

9. In March of 1997, Mr. Guiliani and Danco sued Wal-Mart, alleging violation of 42 U.S.C. § 1981 (hereinafter "§ 1981") as well as breach of contract, unjust enrichment, negligent and intentional infliction of emotional distress, and denial of public accommodations. (App. 4a).

10. In April, 1997, the case was tried before a jury. A wrongful termination claim and a hostile environment claim under § 1981 were presented to the jury along with the state contract and tort actions. The District Court instructed the jury, without any objection from Wal-Mart, Danco and Guiliani were a single person, for purposes of their deliberations and utilized instructions standard for a hostile work environment theory under Title VII and § 1981, omitting references to "employee" because of Plaintiffs' independent contractor status. (App. 4a, 5a).

11. By special verdict, the jury found in favor of the Plaintiffs on the hostile work environment theory under § 1981, on the claim for negligent infliction of emotional distress, and on one of several contract claims. The jury awarded $650,000 on the hostile environment claim and assigned no damages for the emotional distress claim. The verdict was reduced to $300,000 after a remittitur was granted by the District Court, to which Plaintiffs consented. (App. 5a).

12. The First Circuit Court of Appeals affirmed the entirety of the District Court's decision and agreed that § 1981 permits independent contractors to bring hostile work environment claims. (App. 9a).

13. Wal-Mart petitioned to the First Circuit for rehearing en banc. On June 11, 1999, by Order of the En Banc Court, the petition was denied. (App. 45a).

14. Wal-Mart filed a Petition for a Writ of Certiorari to the United States Supreme Court on or about September 9, 1999, seeking review or summary reversal of the First Circuit Court of Appeals decision affirming the District Court judgment. The Petition of Wal-Mart should be denied.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT AN INDEPENDENT CONTRACTOR MAY BRING A HOSTILE WORK ENVIRONMENT CLAIM UNDER 42 U.S.C. § 1981 BECAUSE THAT STATUTE APPLIES TO ALL PERSONS' RIGHT TO BE FREE FROM RACIAL DISCRIMINATION IN CONTRACTUAL RELATIONSHIPS.

The legislative history of 42 U.S.C § 1981 (hereinafter § 1981) is important to understanding why the Court of Appeals decision was correct and need not be reviewed by the United States Supreme Court. Congress enacted § 1981[1] as part of the Civil Rights Act of 1866 pursuant to the congressional power to eradicate slavery as provided by the Thirteenth Amendment. The purpose of § 1981 has always been to protect *all persons* from racial discrimination and to promote this country's national vision of a society where contractual opportunities are equal for all persons. *See* H.R. No. 102-40(II) (1991), *reprinted in* 1991

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[1] 42 U.S.C. § 1981 (1986) stated:

> *All persons* within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. (emphasis added).

U.S.C.C.A.N. 694 (one of the purposes of the Act is to "strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination"). Indeed, "§ 1981 is the only federal law banning race discrimination in the operation of all contracts. It has been a critically important tool used to strike down racially discriminatory practices in a broad variety of contexts." *Id.* (discussing Section 12 "Restoring Prohibition Against All Racial Discrimination in the Making and Enforcement of Contracts").

The Supreme Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) ruled that § 1981's phrase "make and enforce contracts" provided a remedy only for racial discrimination in pre-formation conduct and for discrimination which affected a party's right to enforce a contract by legal process, namely the right to sue, be a party, and or give evidence. *Id.* at 177-78. The *Patterson* Court expressly held a racially hostile work environment claim was not actionable under § 1981 because even though the environment might be discriminatory in the terms, conditions and privileges of a contract, it did not impede the "making" or "enforcement" of a contract. *Id.* at 178-79. *Patterson* also held that termination of a contract on the basis of racial animus did not state a § 1981 claim. *Id.* at 179.

Congress, dissatisfied with this decision which it felt unduly restrained the intended broad reach of § 1981, enacted the Civil Rights Act of 1991, specifically to overrule the *Patterson* decision. *See* H.R. Rep. No. 102-40(I), at 141 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 670. The 1991 amendments added § 1981(b) which defined the phrase "make and enforce contracts" to include "the making,

performance, modification, termination of contracts, and the *enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.*" 42 U.S.C. § 1981(b) (emphasis added). Accordingly, the statute now extends to *all* conduct associated with the contractual relationship.[2]

One way of proving liability under § 1981 is to show that the plaintiff was subjected to a hostile work environment. The phrase "hostile work environment" is a term of art describing a particular theory of recovery under the civil rights statutes. Its use originated in cases interpreting the civil rights statute for employees, Title VII. *See e.g., Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (discriminatory conduct, which is severe and pervasive enough to create an objectively hostile work environment,

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[2] 42 U.S.C. § 1981 (1998) states:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

violates Title VII).[3] The operative language in Title VII is found in 42 U.S.C. § 2000e-2(a)(1), which makes it unlawful for an employer "to discriminate against any individual with respect to his *compensation*, *terms*, *conditions*, or *privileges* of employment because of such individual's race, color, religion, sex, or national origin." *Id.* (emphasis added). Likewise, § 1981 contains substantially this same language, providing that it is unlawful to discriminate on the basis of race with respect to the enjoyment of all "*benefits*, *privileges*, *terms*, and *conditions*" of the contractual relationship. *See* § 1981(b) (emphasis added).

The United States Supreme Court has confirmed that this language, referring to the "terms, conditions, or privileges" of the subject relationship, describes "an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 59 (1986). In essence, the 1991 amendments used the language of Title VII in order to provide a remedy for all contractors against racial discrimination occurring at the beginning, at the middle or at the end of the contractual relationship.

The elements of proof and method of analysis of a hostile environment are the same under Title VII and § 1981.

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[3] The hostile environment theory can be distinguished from discrimination based on a specific adverse employment action which requires a plaintiff to show that he is a member of a protected class, he is qualified for a particular position, he was terminated or denied a promotion, and he was replaced by a person who was not in a protected class. *See Defenbaugh-Williams v. Wal-Mart Stores Inc.*, 156 F.3d 581, 586 (5th Cir. 1998), *aff'd en banc*, 182 F.3d 333 (5th Cir. 1999).

See Amin v. Quad/Graphics, Inc., 929 F. Supp. 73, 81 (N.D. N.Y. 1996) (elements for claim based on hostile work environment are same under Title VII and § 1981); *accord Villanueva v. Wellesley College*, 930 F.2d 124, 127 n.2 (1st Cir. 1991) (analysis of § 1981 claim is "substantially identical" to analysis of Title VII claim). Although the elements of a claim of discrimination under § 1981 and under Title VII are essentially identical, the crucial distinction that Defendant apparently fails to appreciate is that the latter deals with discrimination in all contractual relationships, while the former deals with discrimination in only employment relationships. *See Johnson v. City of Fort Wayne, Indiana*, 91 F.3d 922, 940 (7th Cir. 1996).

While the amended § 1981 is often characterized as prohibiting racial discrimination in all aspects of employment, that only acknowledges the obvious fact that by far the majority of such cases arise in the employer/employee context. *See* Decision of Court of Appeals (App. 9a). Section 1981(b) only speaks in terms of the benefits, privileges, terms, and conditions of the *contractual* relationship, nowhere mentioning the employment context. In fact, the words "employment," "employer" or "employee" are completely absent from § 1981, making any argument that such a limitation exists contrary to the plain language of the statute. *See generally* 42 U.S.C. § 1981.[4]

The Court of Appeals below recognized the importance of the absence of a distinction between the types of contracts to which § 1981 could be applied, and correctly held that

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[4] The word "contract" is used in § 1981 in its basic legal meaning, not a specialized labor law meaning. *See Lane v. Ogden Entertainment, Inc.*, 13 F. Supp. 2d 1261, 1272 (M.D. Ala. 1998).

independent contractors are indeed just as entitled as employees to bring hostile work environment claims under § 1981. As the Court of Appeals stated, "[T]here is nothing in the legislative history to suggest that Congress had any objection to providing similar benefits to independent contractors and the language it used in its amendment applies as readily to one as to the other." (App. 9a). Accordingly, Wal-Mart's Petition for a Writ of Certiorari should be denied.

II. THE COURT OF APPEALS CORRECTLY FOLLOWED ALL OF THE RELEVANT PRINCIPLES OF STATUTORY CONSTRUCTION AND NEITHER A REVIEW NOR A SUMMARY REVERSAL ARE WARRANTED.

Because the Court of Appeals decided correctly and its decision did not implicate any issues where there is a conflict among the circuits below, there is no need for the Supreme Court to spend its scarce judicial resources reviewing this case. The Court of Appeals below recognized that the precise issue before it had not yet been addressed by many courts and rendered an opinion, which reflected a thorough consideration of all of Wal-Mart's arguments and which will become solid precedent for courts facing similar claims in the future. No matter of constitutional dimensions is affected. Therefore, Wal-Mart's petition for a writ of certiorari or in the alternative a summary reversal must be denied.

A. The plain language of § 1981 embraces hostile work environment claims by independent contractors.

The plain language of § 1981, entitled "Equal Rights under the Law," confirms that the statute applies to all persons, not just employees. As the statute states, "[a]ll

persons . . . have the same right . . . to make and enforce contracts . . . enjoyed by white citizens. . . ." 42 U.S.C. § 1981(a). The phrase "make and enforce" covers a broad spectrum, including the "making, performance, modification, and the enjoyment of *all* benefits privileges, terms, and conditions of the contractual relationship." *Id.* at § 1981(b) (emphasis added).

Section 1981's expansive language obviously includes independent contractors and indeed § 1981 has long been held to apply to them. *See, e.g., Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 110 (3d Cir. 1988). The language of a statute, when plain, is conclusive. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); *see also Engine Mfr's Ass'n v. U.S. E.P.A.*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) (explaining that if the text of a statute clearly requires a particular outcome, then the mere fact that is does so implicitly rather than explicitly does not mean it is ambiguous or that the plain language should not control).

Furthermore, Congress need not have specifically considered or articulated each and every possible type of contract § 1981 would protect in order for its aim to include racially discriminatory harassment of independent contractors, when it passed the 1991 amendments to § 1981. This is because statutory prohibitions often go beyond the principal evil to address reasonably comparable evils. *See Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75, 78 (1998). The *Oncale* Court focused on statutory language when it rationalized that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

In this case, the Court of Appeals did not find the language of § 1981 ambiguous, and thus it did not need to resort to other methods of statutory construction. This is in accord with the rule that if there is a construction that gives effect to every word and clause of the statute in question, that construction will be preferred. *Negonsott v. Samuels*, 507 U.S. at 104 (citing *Moskal v. United States*, 498 U.S. 103, 109-10 (1990)). The Court of Appeals noted there was no reason that Mr. Guiliani's and Danco's contract with Wal-Mart would not have included an implicit contractual benefit or term that Mr. Guiliani would not be subjected to a racial epithets, graffiti, and violence in his work environment while he fulfilled his contractual agreement with Wal-Mart. (App. 8a). Such a finding is supported by the plain language of § 1981, which prevents discrimination in all aspects of contractual relationships. Accordingly, Wal-Mart's petition for review should be rejected.

B. The rules that remedial statutes should be broadly construed and that the will and intentions of Congress should be given effect support the Court of Appeals interpretation of § 1981.

Wal-Mart argues that although § 1981 does apply to both independent contractors and employees in some respects, it does not in others. Specifically, Wal-Mart asserts that while § 1981 proscribes discrimination in the formation, termination and *conditions* of employees' contractual relationships, it only applies to discrimination in the formation or termination, but *not* the conditions of independent contractors' contracts. Wal-Mart's preferred interpretation of § 1981 focuses more on the meaning of words which are absent from the statute, than on the words which are present and embodied in the express statutory

language. This is not in accord with how the Supreme Court has historically examined remedial statutes. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) (noting that the lack of a statutory provision in Title VII permitting damages which were intangible or were not economic in nature would not be construed to impose a limit on such damages).

Remedial statutes like § 1981 should be interpreted broadly. *See Voris v. Eikel*, 346 U.S. 328, 333 (1953) (holding that when a statute is remedial in nature, it "must be liberally construed in conformance with its purpose, and in a way that avoids harsh and incongruous results"); *see also L.N. McDonald v. Santa Fe Trail Transportation Comp.*, 427 U.S. 273, 289 (1976) (discussing the remedial goals of § 1981 and broadly construing its language to disallow discrimination against both whites and non-whites). Congress has emphasized that it will not tolerate a narrow and parsimonious construction of federal civil rights laws, but rather requires a broad construction that provides maximum protection against discrimination. *See* 42 U.S.C. § 1107 ("All federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.")

Congress' 1991 decision to amend § 1981 so that "mak[ing] and enforc[ing] contracts" was more broadly defined to include "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," § 1981(b), should not be misconstrued. Notably, Congress chose to use language which closely tracked the Title VII

language,[5] which had been consistently interpreted to embrace hostile work environment claims. *See Ingersoll-Rand v. McClendon*, 498 U.S. 133, 144-45 (1990) (when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted similarly). Congress clearly wanted to do more than insure that Wal-Mart would not discriminate in its decision to form a contract or terminate a contract with Mr. Guiliani and Danco based on race. Congress wanted to be certain that Wal-Mart would be held legally responsible if it took no remedial measures to protect Mr. Guiliani and Danco from being forced to endure pervasive, hostile, racially discriminatory harassment during all phases of the contractual relationship. The broad reach of § 1981 thus requires that the hostile work environment theory be available to independent contractors.

Wal-Mart argues, without any supporting authority, that because employees and independent contractors enjoy different levels of independence from their work sites, independent contractors should be prohibited from having any legal recourse whatsoever when only the "benefits, privileges, terms and conditions" of their contract are infringed. Yet, Wal-Mart appears ready to concede that the protections are unaltered when the discrimination occurs in the formation or termination of the relationship. Wal-Mart's interpretation is directly contradictory to the express

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[5] Discrimination in the "terms conditions or privileges of employment" is prohibited by Title VII. *See* 42 U.S.C. § 2000e-2(a)(1); *see also Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75 (1998) (explaining that this language "evinces a congressional intent to strike at the entire spectrum of disparate treatment . . . in employment" and that its application should not be narrowly construed.)

language of § 1981, as amended, and would serve to significantly undermine the explicit expressed intention of the 1991 amendments to overrule the *Patterson* decision, and "bar all race discrimination in contractual relations." *See* H.R. Rep. No. 102-40(I), at 92, *reprinted in* 1991 U.S.C.C.A.N. 549, 630.

According to Wal-Mart's interpretation, if Mr. Guiliani had been a Wal-Mart employee subject to a hostile environment created by Wal-Mart employees, he would have had the right under § 1981 to bring his claim; but as an independent contractor, working at Wal-Mart's premises he has no remedy from a racially hostile environment created by Wal-Mart employees.[6] In essence, Wal-Mart is asserting that its employees are only required to treat their fellow Wal-Mart co-workers with dignity and respect, whereas independent contractors can be made to endure racially derogatory epithets and graffiti, as well racially motivated violence, without any recourse under the nation's civil rights laws. Certainly such a result was not the intent of Congress when it enacted § 1981 or when it amended § 1981 in 1991. The Court of Appeals recognized the important reasons behind the amendment to § 1981, and its decision need not be reviewed.

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[6] Wal-Mart's conclusion that Mr. Guiliani's and Danco's freedom to terminate the contract with Wal-Mart provides adequate protection from a racially hostile work environment is nonsensical since by that same theory, an employee can also avoid racial discrimination in the workplace, and Wal-Mart agrees that employees have better protection from discrimination under § 1981. Moreover, Mr. Guiliani and Danco could be subjected to claims by Wal-Mart for contract breach for simply walking away in the face of racial discrimination.

C. The historical distinction between independent contractors and employees is irrelevant to the analysis of § 1981, which applies to all contracts.

As the First Circuit Court noted, the historical distinction between independent contractors and employees does not change how hostile work environment claims under § 1981 are analyzed. As mentioned above, § 1981 has long been held to apply to independent contractors. *See, e.g., Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 110 (3d Cir. 1988) (permitting independent contractor's § 1981 claim to go to jury); *Wright v. State Farm Mutual Auto Insurance Company*, 911 F. Supp. 1364, 1376 (D. Kan. 1995) (court assumed without discussion that an independent contractor could bring a § 1981 hostile work environment claim but dismissed case on the merits); *Miller v. Advanced Studies Inc.*, 635 F. Supp. 1196, 1199 n.4 (N.D. Ill. 1986) (noting that the plaintiff's § 1981 claim was not affected by the employee/independent contractor distinction).[7]

The Supreme Court has confirmed that the 1991 amendments to § 1981 apply to "all contracts." *See Rivers v. Roadway Express*, 511 U.S. 298, 304 (1994) (noting specifically that former § 1981, and hence the 1991 amendments to § 1981, were not limited to employment).

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[7] Since the decision in *Runyon v. McCrary*, 427 U.S. 160 (1976) (community recreational center could not deny membership to applicant on the basis of race), where the court held that § 1981 "prohibits racial discrimination in the making and enforcement of private contracts," § 1981 has been applied to a wide variety of contracts outside of the employment context. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (Justice Brennan concurring in part and dissenting in part) (collecting contract cases brought under § 1981 which did not involve employment contracts).

The meaning that Wal-Mart attempts to attach to the lack of a distinction between independent contractors and employees in the statutory language or legislative history of the 1991 amendments to § 1981 borders on the ludicrous. *See generally*, H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549; and H.R. Rep. No. 102-40(II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 694. Wal-Mart's assertion that independent contractors are unprotected by all of § 1981 and by implication have no protection from racial discrimination in their work environments is harsh and contrary to what Congress intended. *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 189 (1989) (Brennan, J., concurring in part and dissenting in part) ("civil rights should be construed to further our Nation's commitment to the eradication of racial discrimination," not to adopt "a formalistic method of interpretation antithetical to Congress' vision of a society in which contractual opportunities are equal.").

Section 1981 is virtually the *only* anti-discrimination statute available for independent contractors, like Mr. Guiliani and Danco. *See Jean Anderson Hierarchy v. Allstate Life Insur. Co.*, 2 F. Supp. 2d 688 (E.D. Pa. 1998) (precluding independent contractors from seeking remedies under Title VII and the Fair Labor Standards Act, and severely limiting their common law tort actions).[8] Stripping independent contractors of the full statutory protection § 1981 provided to employees would in essence leave all

[8] Commentators have discussed the problem of limited avenues for independent contractors to assert claims of discrimination and noted that § 1981 is one of the only vehicles available for independent contractors to assert racial discrimination. *See generally* Lewis L. Maltby & David C. Yamada, 38 BOSTON L. REV. 239, 258 (March 1997).

independent contractors vulnerable to racial discrimination in their workplaces without recourse. It would have been counterintuitive for Congress to broaden the application of § 1981 such that an even greater disparity was created between the rights of employees and independent contractors to fight discrimination. Therefore Wal-Mart's writ must be denied.

D. There is no policy reason that should preclude independent contractors from bringing hostile work environment claims under § 1981.

Wal-Mart's contentions that it would be awkward or excessively burdensome to take reasonable precautions to protect both its employees and its independent contractors from racially hostile environments were properly deemed an exaggeration by the Court of Appeals, *see* (App. at 9a), and should not be grounds for granting a writ of certiorari here. The Court of Appeals noted that the requirements for showing a hostile work environment are just as stringent for non-employees as for employees, both of whom must similarly show:

> 1) that the plaintiff was exposed to comments, jokes, or acts of a racial nature by the defendant's employees; and
>
> 2) that the conduct had the purpose or effect of interfering with the plaintiff's work performance or created an intimidating, hostile or offensive work environment.

(App. at 13a) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20-22 (1993)). Moreover, a defendant will ordinarily

only be liable for harassment by low-level employees if management level employees knew or should have known about it. *See Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 955 (9th Cir. 1999).

Although *Harris* and other discrimination cases explain the elements for hostile environment claim under Title VII, that analysis has been held to be substantially identical to that utilized under § 1981. *See Defenbaugh-Williams v. Wal-Mart Stores Inc.*, 156 F.3d 581, 587 (5th Cir. 1998), *aff'd en banc*, 182 F.3d 333 (5th Cir. 1999) (explaining that claims of racial discrimination brought under § 1981 are governed by the same evidentiary framework applicable to Title VII employment discrimination claims). In general, courts have had no problem utilizing the Title VII hostile environment analysis in § 1981 actions involving employees, and there is no reason to think that the circumstances of independent contractors would alter or make more cumbersome this analysis. *See Williams v. Carrier Corp.*, 889 F. Supp. 1528, 1530 (M.D. Ga. 1995) (explaining that § 1981 applies to hostile environment claims as well as "all phases and instances of the contractual relationship" and citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304 (1994)).

The Court of Appeals opinion did not alter the standard requirements for succeeding on a hostile environment claim. Thus, Wal-Mart need not fear that it will obligated to go to extreme measures to avoid civil rights actions, if this Court denies its petition. Wal-Mart is required to do no more for its independent contractors in maintaining a discrimination free work environment, than it is required to do for its employees. It simply must enforce its discrimination prevention policies regarding those individuals and premises that are under its control. Surely such a requirement is not

new or unique and cannot be considered awkward or burdensome.

Furthermore, a prerequisite for liability for a hostile work environment is that there is something the employer can do to remedy the environment. *See Witt v. Roadway Express*, 880 F. Supp. 1455 (D. Kan. 1995), *rev'd in part on other grounds*, 136 F.3d 1424 (10th Cir. 1998) (employer may be liable under § 1981 for failing to remedy or prevent hostile work environment of which management level employees knew, or in the exercise of reasonable care should have known). Wal-Mart's argument that its written Harassment/ Inappropriate Conduct Policy could not apply to or be disseminated to all of its independent contractors fails to grasp its policy's purposes. The purposes of the Harassment/ Inappropriate Conduct Policy are to ensure that racial harassment by Wal-Mart employees will not be tolerated, *regardless* of whether the victims of such discrimination are other Wal-Mart employees or independent contractors.

There simply is no authority which would suggest that a person who lawfully invokes incorporation laws and chooses to earn his living as an independent contractor, thereby forfeits his § 1981 right to be free of racially based harassment and hostility in his work environment. The evidence in this case clearly showed that Wal-Mart failed to take reasonable steps to prevent and promptly correct the racially hostile behavior. It failed to adequately investigate racial incidents and violence, and in fact, even remove the racist "White Supremacy" graffiti from the parking lot that Mr. Guiliani maintained for Wal-Mart. Likewise, Plaintiff Guiliani did everything he could to prevent the racial incidents from reoccurring by promptly reporting the incidents to both Wal-Mart management and the police.

It would not have been awkward or unduly burdensome for Wal-Mart's supervisory employees to have taken reasonable remedial measures after learning of the discrimination to which Mr. Guiliani was being subjected at the hands of Wal-Mart employees on its premises.

Wal-Mart's assertion that applying § 1981 to independent contractors' hostile environment claims would be unworkable is axiomatic. This Court need not grant certiorari to review Wal-Mart's strained attempts to unduly narrow the evil that Congress sought to correct with the 1991 civil rights amendments. *See United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951) (statute's meaning interpreted in light of the evils at which the legislation was aimed). The statute clearly allows an independent contractor to recover if he can establish that he has been subjected to racial hostility in the workplace. If Wal-Mart believes it should be permitted, as a matter of statutory and constitutional law, to treat its independent contractors in a racially hostile and discriminatory manner during the performance of their contracts, its remedy is with Congress, not this Court. The Petition for Writ of Certiorari should be denied.

III. THERE IS NO CONFLICT IN THE LOWER COURTS OVER WHETHER CORPORATIONS CAN ESTABLISH STANDING TO BRING § 1981 HOSTILE ENVIRONMENT CLAIMS ON BEHALF OF THEIR EMPLOYEES.

Wal-Mart asserts that the eminently personal nature of hostile work environment claims should preclude independent contractors like Danco from asserting them on behalf of an employee like Mr. Guiliani. Wal-Mart's theory

is apparently that the particularized injury necessary for the contracting corporation to have standing cannot be shown in such cases.[9] Wal-Mart's attempts to extrapolate the potential that a corporation may not always be damaged by its employee being subjected to a hostile environment into a reason to review this case, are without merit. The Court of Appeals found that Wal-Mart had waived the right to assert any so-called standing defense, and that Danco had established a sufficient injury for standing in any event. Thus, there are no grounds for this Court to review the decision below.

Nonetheless, Wal-Mart alleges that the Court should grant a Writ of Certiorari to resolve an alleged conflict among the lower courts that is based upon a purported disagreement over the interpretation of certain *dicta* in the Supreme Court decision, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977) ("a corporation has no racial identity and cannot be the direct target of discrimination").[10] The relevance of any alleged

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[9] Supreme Court jurisprudence has made it clear that a stamp of minority is not required to complain about racial discrimination and that damages may be indirect and based upon associations. *See, e.g., Sullivan v. Little Huntington Park, Inc.*, 396 U.S. 229, 237 (1969); *Barrows v. Jackson,* 346 U.S. 249, 256 (1953) (permitting non-minorities to claim their interactions with minorities instigated discrimination which injured them). Furthermore, Wal-Mart, prior to the Court of Appeals decision upholding a substantial verdict against it, never argued that Mr. Guiliani or Danco did not have standing to pursue their claim, thus conceding that standing is a non-issue.

[10] Notably, Wal-Mart did not consider this alleged conflict over corporate standing to be important enough to present it as a question before this Court. *See* Petition for Writ of Certiorari, at i.

conflict among circuits regarding the standing of a corporations is difficult to discern, and not precisely articulated by Wal-Mart. Nevertheless, a careful review of the allegedly conflicting cases cited by Wal-Mart, reveal that there is no conflict among circuits as to whether a corporation can have standing to claim that it has suffered damages from racial discrimination and pursue a § 1981 claim.[11]

Wal-Mart cites two cases in the District of Columbia Circuit as holding that a plaintiff corporation did not have a racial identity and therefore did not have standing. In *Gersman v. Group Health Ass'n*, 725 F. Supp. 573 (D.D.C. 1989), the district court did find that the corporation was independent of the racial identity of its employees and therefore did not have standing to bring a § 1981 claim. *Id.* at 577. However, the Court of Appeals disapproved of this reasoning and ruled that corporations can have standing to bring § 1981 claims and that the corporation did not need to have a racial identity in any event. *See Gersman v. Group Health Ass'n*, 931 F.2d 1565, 1568 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068, *but original adopted on remand*, 975 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994). The Circuit Court concluded that so long as the corporation can suffer an injury from the

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[11] It should be noted that the Court of Appeals cited the *Gersman v. Group Health Ass'n*, 931 F.2d 1565, 1568 (D.C. Cir. 1991) case as authority for its decision that Danco had standing, without mentioning any conflict among the Circuits on the issue. This is probably because the Court of Appeals, like the Respondent in the case at bar, was unable to discover any true conflict as to whether a corporation may have standing to bring § 1981 claims for discrimination against its employees.

discrimination, it has satisfied the prudential test for standing. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).[12]

Wal-Mart then claims that the case of *Clifton Terrace Assocs. Ltd. v. United Technologies Corp.*, 929 F.2d 714 (D.C. Cir. 1991) further illustrates a conflict. The *Clifton* court states that the plaintiff, a subsidized housing association, was not sufficiently identified with its tenants in order to have standing to make a § 1981 claim on the tenants' behalf. The *Clifton* court reasoned that the tenants, as the direct discrimination victims, could bring their own claims, and that ultimately no matter who brought the claims, no *prima facie* case of discrimination had been made. *Id.* at 722. Thus, any of its statements regarding standing are merely *dicta*. Furthermore, the more recent *Gersman* decision made it clear that corporations can have standing to bring § 1981 claims in the District of Columbia Circuit. *See Gersman v. Group Health Ass'n*, 931 F.2d at 1568.[13]

The final case cited by Wal-Mart purportedly demonstrating a conflict is *Hotel St. George Assocs. v. Morgenstern*, 819 F. Supp. 310 (S.D.N.Y 1993). In *Hotel St. George*, the court ruled that a housing association did

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[12] The Court of Appeals in *Gersman* did affirm the lower court's ultimate denial of the corporate plaintiff's claim that its contract was canceled because of its shareholder's religious affiliation, based upon the *Patterson* decision excluding discriminatory termination as grounds for a § 1981 action. *See Gersman v. Group Health Ass'n*, 931 F.2d 1565, 1570 (D.C. Cir. 1991).

[13] The *Clifton* decision was handed down on April 5, 1991 and the *Gersman* Circuit Court decision was handed down on July 5, 1991 by the same court.

not have standing under § 1981 or other civil rights statutes to prosecute the claims of its residents. *Id.* at 318-19. The court noted that this was because a housing provider's interests are too often adverse to that of its residents, who could bring their own claims. *Id.* at 319 n.7.

In the case at bar, Guiliani's and Danco's interests were never adverse. Danco could only act through its owner and employee, Guiliani. *See, e.g., Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982); *T&S Serv. Assocs., Inc. v. Crenson*, 666 F.2d 722, 725 (1st Cir. 1981); *see also Fullilove v. Klutznick*, 448 U.S. 448, 455 (1980) (the Court entertained, without questioning standing, the claims of several associations of minority contractors seeking their set aside rights under 42 U.S.C. § 6701 *et seq.*). Therefore, *Hotel St. George* is inapposite to the case at bar.

Furthermore, although the *Hotel St. George* court did not state this additional reason for the corporation lack of standing, it is apparent from the facts of the case that the plaintiff did not have a contract with the defendants, who were merely community activists, petitioning their government for policy changes. *Hotel St. George Assocs. v. Morgenstern*, 819 F. Supp. at 314. Thus, under the plain language of the statute, the Association could not have brought its § 1981 claim, and the discussion of the suitability of the association to prosecute its residents' civil rights cannot support a conflict relevant in the matter before this Court.

The line of cases set forth in Wal-Mart's Petition at 20, which hold that corporations either can have the racial identity of their shareholders or controlling officers or do

not need to have a racial identity to establish standing, so long as they have suffered injury due to their association with racial minorities, are in line with the Court of Appeals decision below. *See also Great American Tool Co. v. Adolph Coors Co., Inc.*, 780 F. Supp. 1354 (D. Colo. 1992) (president and sole shareholder's minority identity was stamped upon corporation and their corporate and individual civil rights claims merged).

The allegedly conflicting cases, cited by Wal-Mart, do not evidence any dissension among the circuits, over whether a corporation may ever sustain a particularized injury that establishes standing in a civil rights action. Furthermore, even Wal-Mart does not suggest that a heightened burden for corporations bringing civil rights claims is proper or that the Court of Appeals decision on this issue was in error. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (stating that in order to establish standing "[a] plaintiff must only allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief"). Moreover, Wal-Mart has never argued to this Court or to any court below that Danco and Mr. Guiliani did not have an actionable § 1981 contract relationship with Wal-Mart. Accordingly, the Court should decline Wal-Mart's request for review.

CONCLUSION

For the foregoing reasons the Respondent respectfully requests that the Court deny Wal-Mart's Petition for a Writ of Certiorari.

Respectfully submitted,

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